United States Court of Appeals

for the Second Circuit

APPENDIX

Original w/ affidavit of mailing

BJS

75-1052

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1052

UNITED STATES OF AMERICA,

Appellant,

—against—

TOMMY ROBERTS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

5

PAGINATION AS IN ORIGINAL COPY

INDEX TO GOVERNMENT'S APPENDIX

Form No. 100

INAL DOCKET

73CR 884

DOOLING, J.

A. 1

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
TOMMY ROBERTS	
	For Defendant:

eft of mail

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
t,							
shal,							
rney,							
missioner's Court,							
nesses,							

ATE	PROCEEDINGS
2-73	Before Travia J - Indictment filed.
15-73	Before TRAVIA J - Case called - deft & counsel John Gutman of Legal Aid present - deft arraigned and waives reading of Indictment and enters a plea of not guilty - 20 days for motions - bail contd.
23/73	Notice of readiness for trial filed
3/74	Before DOOLING,J.- Case called- Conference held and concluded- Conference set for 11/20/74- Trial set for 2/3/75
-20-74	Before DOOLING J - case called - Conference held - Next Conference set for Dec. 6, 1974 at 9:30 am.
/74	Before DOOLING,J.- Case called- Deft Tommy Roberts not present- Bench Warrant ordered and stayed until Dec. 13, 1974.
/74	Stenographer's transcript of Oct. 15, 1974 filed.

73CR 884

A 2

DATE	PROCEEDINGS
-10-74	Before Dooling J - case called - deft & counsel M.Seltzer of Legal Aid present - deft to file prompt disposition motion.
-12-74	Magistrate's file 73 M 785 inserted into CR file.
-16-74	Notice of Motion for dismissing the Indictment and Memorandum of Law filed (forwarded to Chambers)
-15-75	Govts Memorandum of Law filed
6/75	Govt's memorandum of law filed
17-75	Before Dooling J - case called - motion for dismissal of the indictment, motion argued - decision reserved.
0-75	By DOOLING J - Memorandum and Order filed granting defts motion for dismissal of the indictment. Ordered that the indictment is dismissed.
9/75	Stenographers Transcript dated 1/17/75 filed
13/75	Memorandum from Judge Dooling dated 1/6/75 filed re: that motion to dismis will be argued on 1/17/75 at 4:30 P.M. (document filed out of orde)
13/75	Memorandum from Judge Dooling filed re: that pre-trial conference is scheduled for 12/6/74 (document filed out of order)
13/75	Memorandum from Judge Dooling filed re:that pre-trial conference is schedul for 11/20/74 (document filed out of order)
13/75	Memorandum from Judge Dooling filed re:that case will be tried on 2/3/75 (document filed out of order)
13/75	Memorandum from Judge Dooling filed re:that pretrial conference is sched for 11/13/74 (document filed out of order)
/13/75	Govt's Notice of appeal filed
/13/75	Docket entries and duplicate of notice of appeal mailed to court of appe

NCR FAM:bj
F# 733097

INDICTMENT 73 CR 884

A 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

-against-

TOMMY ROBERTS,

Defendant.

- X

Cr.No. 73 CR 884
(T. 18, U.S.C. §1708)

Oct. 2, 1973

TRAVIA, J.

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111917 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT TWO

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 42938545 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT THREE

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43109766 dated May 1, 1973 which was the contents of a letter

stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT FOUR

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111590 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT FIVE

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111592 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT SIX

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111881 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT SEVEN

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111907 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT EIGHT

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111937 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT NINE

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43111960 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

COUNT TEN

On or about the 1st day of May 1973, within the Eastern District of New York, the defendant TOMMY ROBERTS did unlawfully have in his possession a City of New York Department of Social Services Check No. 43112183 dated May 1, 1973 which was the contents of a letter stolen from the United States Mail, the defendant knowing the same to have been stolen. (Title 18 United States Code, §1708)

A TRUE BILL

FOREMAN

ROBERT A. MORSE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

TRANSCRIPT OF OCTOBER 15, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

TOMMY ROBERTS, : 73 CR 884

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

October 15, 1973
10:00 o'clock a.m.

B e f o r e :

HONORABLE ANTHONY J. TRAVIA, U.S.D.J.

DANIEL D. SIMON
OFFICIAL COURT REPORTER

Appearances:

ROBERT MORSE, ESQ.
United States Attorney
for the Eastern District

BY: E. A. MOORE, ESQ.
Assistant United States Attorney

JOHN GUTMAN, ESQ.
Attorney for the Defendant

THE COURT: Tommy Roberts.

MR. GUTMAN: I haven't seen Mr. Roberts.

THE COURT: Bench warrant.

Do you have any idea, Mr. Gutman, since you have been on this case --

MR. GUTMAN: I don't, your Honor, he has been in fact --

THE COURT: -- to whether or not he is due to appear? I am sure he is due here.

MR. GUTMAN: He is due here. I understood there would be a disposition.

MR. MOORE: Here he is.

THE COURT: Oh, okay. Up front, Mr. Roberts.

Mr. Roberts, what time were you supposed to be here?

THE DEFENDANT: 10:00 o'clock. I had to come from Rockaway.

THE COURT: Well, next time start a little earlier.

I have before me an indictment in which you are named the defendant which is a ten-count indictment. Have you seen it?

THE DEFENDANT: Yes.

THE COURT: What's your pleasure? Do you want

me to read it out loud or do you waive a reading at this time?

THE DEFENDANT: Yes, waive it.

THE COURT: Waives reading at this time.

And pleads?

MR. GUTMAN: Not guilty.

THE COURT: What's the bail here?

MR. MOORE: The defendant is presently on $5,000 personal recognizance bond. The Government has no objection to continuing that bail status.

THE COURT: Bail continued. Twenty days for motions.

When you are called you make sure you come at the right time or your bail will be revoked and you will be remanded.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand?

THE DEFENDANT: Yes.

THE COURT: Keep in touch with your lawyer and he will tell you what to do.

* * * *

EJR:EAM:gp
F. 733097

NOTICE OF READINESS FOR TRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 11

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA :

-against- :

TOMMY ROBERTS, :

Defendant(s) :

- - - - - - - - - - - - - - - - - - X

NOTICE OF READINESS FOR TRIAL

Court Docket No.
73 CR 884

S I R (S) :

PLEASE TAKE NOTICE that the United States is ready for trial.

Since the defendant(s) is/~~are~~ not in custody a trial date will be requested as soon as the case can be reached by the Court, subject to receiving three days' advance notice of the actual date for trial.

Dated: Brooklyn, New York
October 23, 1973.

Yours, etc.

ROBERT A. MORSE
United States Attorney
Eastern District of New York

By Emanuel A. Moore
Emanuel A. Moore
Assistant U. S. Attorney

TO:

HONORABLE
United States District Judge
Hon. Anthony J. Travia

Attorney(s) for Defendant(s)
Legal Aid Society
26 Court Street
Brooklyn, N.Y.

AFFIDAVIT OF MAILING

A 12

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

Geraldine Pogoda, being duly sworn, says that on the 23rd day of Oct. 1973, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Notice of Readiness for Trial of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hon. Anthony J. Travia

Legal Aid Society
225 Cadman Plaza East
Brooklyn, N.Y.

Sworn to before me this
23rd day of Oct. 73

Geraldine Pogoda

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

_____, being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the _____ day of _____, he served a true copy of the annexed _____ on the office of _____ attorney for _____ herein, located at _____, Borough of _____, City of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

_____

Sworn to before me this
day of

_____

NOTICE OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- : NOTICE OF MOTION

TOMMY ROBERTS, : 73 CR 884

Defendant. :

----------X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARION SELTZER, duly sworn to this 11th day of December, 1974. and upon all the papers and proceedings heretofore and herein, the undersigned will move this Court before the Honorable JOHN F. DOOLING, JR., in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York on a date to be set by the Court, or as soon as counsel can be heard for an order dismissing the indictment in the above captioned case, pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment of the United States Constitution, and for such other and further relief as to this Court may seem just and proper.

DATED: BROOKLYN, NEW YORK

December 11, 1974

Yours etc.,
WILLIAM GALLAGHER, ESQ.
FEDERAL DEFENDER SERVICES UNIT
LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11201

TO: DAVID G. TRAGER
UNITED STATES ATTORNEY

CLERK OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 14

----------X

UNITED STATES OF AMERICA, :

-against- : AFFIDAVIT

TOMMY ROBERTS, :

Defendant. :

----------X

STATE OF NEW YORK) SS:
COUNTY OF KINGS)

MARION SELTZER, Being duly sworn deposes and says:

That she is an attorney associated with FEDERAL DEFENDER SERVICES UNIT/LEGAL AID SOCIETY, the attorney of record for the defendant herein, TOMMY ROBERTS, JR.

That this affidavit is submitted in support of defendant's motion for an order dismissing the indictment in the above-captioned case, pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment of the Constitution.

The defendant was arrested on July 12, 1973. He was released on a $5,000 Personal Recognizance Bond.

The defendant was indicted on or about October 2, 1973.

The defendant pleaded not guilty to a ten (10) count indictment on October 15, 1973, before the Honorable ANTHONY TRAVIA. At that time the Court was advised that there would be a disposition (plea) in the case.

On or about October 15, 1973, defendant's attorney was advised by the Assistant United States Attorney that Mr. Roberts would be permitted to plead guilty to a misdemeanor to cover the charges in the indictment after the defendants, in a related case, were disposed of.

On October 23, 1973, the government filed a Notice of Readiness for trial.

Between October, 1973 and November 1974, Judge Travia, never rescheduled the case, nor did the United States Attorney's office have any contact with defense counsel in regard thereto.

That in November 1974, the case was transferred to the Honorable JOHN F. DOOLING, JR., and scheduled for a pre-trial conference on November 13, 1974.

That on November 13, 1974, counsel for defendant orally moved pursuant to the Sixth Amendment of the Constitution for a dismissal of the indictment. Formal motion papers are contain herein.

That the defendant, TOMMY ROBERTS, JR., was born on May 21, 1948 in Salsbury, North Carolina.

That the defendant, TOMMY ROBERTS, JR., has no prior criminal record.

That had the case been disposed of promptly, the defendant would have been eligible for sentencing pursuant to the Federal Youth Corrections Act, Title 18 U.S.C., §4209 and §5010 and thereafter would have been eligible for a Certificate Setting Aside the Conviction pursuant to 18 U.S.C. §5021.

That had the defendant been so sentenced, he would have been able to avoid the stigma and consequences of a life - long criminal record.

That the defendant, became 26 years of age on May 21, 1974, and is no longer eligible to be sentenced pursuant to the Youth Correction Act.

That had the prosecution of his case been prompt and had the defendant been afforded his Sixth Amendment rights, he would not have incurred the irreparable harm that will befall him if this motion is not granted.

That the defendant has in no way contributed to the de-

lay in the prosecution of this case.

WHEREFORE, it is respectfully urged that defendant's motion to dismiss be granted for failure to afford him a speedy trial, pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure and any further relief that this Court may seem just and proper.

/s/MARION SELTZER
MARION SELTZER

Sworn to before me this.
11th day of December, 1974.

[illegible] CHEIN
Notary Public, State of New York
No. 31-5603715
Qualified in New York County
Commission Expires March 30, 19[illegible]

TRANSCRIPT OF JANUARY 17, 1975 A 17

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- : 73-CR-884

TOMMY ROBERTS, :

Defendant :

----------x

United States Court House
Brooklyn, New York

4:30 o'clock P.M.
January 17, 1975

B e f o r e :

HONORABLE JOHN F. DOOLING, JR.,

U.S.D.J.

MOTION FOR AN ORDER
DISMISSING THE INDICTMENT

ILENE GINSBERG
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney for the
Eastern District of New York

BY: A. ANTHONY SCHALL, ESQ.,
Assistant United States Attorney

MARION SELTZER, ESQ.,
Legal Aid Society
For the Defendant

******

MS. SELTZER: Good afternoon, your Honor.

THE COURT: Good afternoon, Ms. Seltzer.

MR. SCHALL: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. SELTZER: Would it be better -- I have certain answers to make to the Government's memorandum which I received two days ago. I don't want to just reiterate everything in my memorandum. That would be a waste of your time.

THE COURT: Well, proceed any way you want to.

MS. SELTZER: Your Honor, it seemed to me that the Government made certain assumption in a memorandum with which I would disagree.

I would go through the four points that were gone into in the Barker case; the length of the delay, the reasons for the delay, and so on. I would feel more organized that way.

The Government seems to think the length of delay for nineteen months is not sufficient delay for which the Court could find infringement of the defendant's right to a speedy trial.

While I grant Mr. Schall that there are many cases in excess of that period which are held not to be a denial of the speedy rights, I think in this circumstance it is in fact a denial of that right.

The cases say that in order to determine whether the nineteen months is denial of a speedy trial, you have to examine the other circumstances.

I am sure Mr. Schall can quote cases where as much as twenty-four months have not been held to be excessive, and I can state many cases where less time has been held to be excessive.

THE COURT: If you are talking about the Sixth Amendment --

MS. SELTZER: Yes.

He cited Fasanaro, wherein a forty-eight month delay was not held excessive.

THE COURT: I think Barker against Wingo itself is distinguishable. As a matter of fact, when you read it, you got the feeling it would end other than it did.

MS. SELTZER: In my memorandum, I would specifically put the onus on Judge Travia as the reason for the delay, and I meant to imply that I thought Judge Travia was responsible for the failure in calling the case for a period of one year. But I did not mean to imply that I didn't think that the Government also had a burden.

THE COURT: Well, let me ask this: Who has the two Smith's? Have I got them?

MR. SCHALL: Yes.

THE COURT: Where are they?

MR. SCHALL: The status, if I may interrupt Ms. Seltzer's presentation --

THE COURT: It seemed to me that the Government indicated that they were unwilling to follow through with the thought of disposition until something had been done in the Smith case or cases.

MS. SELTZER: Correct.

THE COURT: So, what I'm trying to figure out, is what held up the Smith case? Were they also assigned to Judge Travia?

MR. SCHALL: The Smith cases have followed the exact same course as the Roberts case, and in fact, I think it is an indication of their closeness.

You will see in the docket numbers --

THE COURT: Oh, yes.

MR. SCHALL: It has followed the exact same course.

The present status of the cases is that our office is presently in contact with the Smith brothers' attorney, and discussions are under way toward a disposition.

They also have FHA cases pending, and we are seeking to work out what you would call, for want of a better word, a "package deal."

THE COURT: Well, they were not tried in with

Judge Travia's case then, I take it.

MR. SCHALL: I am not entirely clear -- No. I mean, they were not defendants or anything. You mean, the six months case?

THE COURT: Yes.

MR. SCHALL: No, they were not defendants. They have FHA involvement, but they were not defendants in that case, or to my knowledge, witnesses.

THE COURT: Or parallel cases --

MR. SCHALL: It's a parallel situation --

THE COURT: (continuing) -- that have been referred to Judge Travia as related to the Bernstein case?

MR. SCHALL: I don't know if there has ever been a formal FHA charge brought against the Smith's in terms of an indictment or an information.

THE COURT: Well, let me ask you, were they in the whole Eastern Management Corporation -- or whatever it was -- business? What did they run -- a check-cashing agency in Bed-Stuy?

MR. SCHALL: I don't know if they were involved in acts committed in an enterprise involving the Bernsteins, or their own enterprise.

THE COURT: As I understand it, in consequence of the two hundred Count Bernstein case before Judge Travia, a great many other cases were assigned to him as related

cases which -- oh, people who paid bribes, people who received bribes, people who were proffered by the testimony of the same witnesses, and so on. And I am wondering if the Smith brothers were part of this group, and who represented them, for example?

MR. SCHALL: They are presently represented by Mr. Barry Krinsky.

THE COURT: I don't know him.

MS. SELTZER: Yes, you do, your Honor. He used to be with Legal Aid.

THE COURT: Oh, yes, certainly.

MR. SCHALL: But it's my -- and I might be wrong on this, your Honor, because I have not been handling the FHA part of the Smith history -- but as I understand it, and I might be incorrect, but as I understand it, there was never a case, per se, in terms of Smith, of anything being on Judge Travia's calendar.

THE COURT: So, they had check cases parallel --

MR. SCHALL: They had cases parallel to the Roberts case.

THE COURT: I take it they were wholesalers?

MR. SCHALL: I think the evidence would show that it was something along the lines of employer/employee or master/servant relationships, Mr. Roberts in the latter capacity.

THE COURT: He was the junior?

MR. SCHALL: Possibly, but I couldn't speak with certainty on that, and I think the question of cooperation came up in that context -- Mr. Roberts aiding the Smith's.

THE COURT: Was a notice of readiness filed in the Smith cases, do you know?

MR. SCHALL: Yes.

I don't have the folders with me here, but from my memory, and looking at the folders, I am quite certain that notices of readiness were filed about the same time as those which were filed in this case.

MS. SELTZER: My position is -- and I specifically did not make this motion under the Second Circuit rules--

THE COURT: Why not? That puzzles me.

MS. SELTZER: It was my feeling, from the other decisions handed down in this Court that the Court would find that under the Second Circuit rules, the Bernstein case may constitute an exceptional reason for delay under those rules, but my feeling is that the delay in this case is so great, and the prejudice is so great that it in fact becomes a Constitutional issue, and in fact the right to a speedy trial is a fundamental and Constitutional right, and no matter whether it is the Government's fault , or Judge Travia's fault, or whether the

system's fault, he has been denied a Constitutional right, and because of that it should be a Constitutional argument, and it is because of that -- I was under the impression from knowing the other decisions that have come down, that you would not grant it under the six month role, but I think he has been so badly prejudiced that relief must be granted.

It is not a question of whether Mr. Schall is 10 percent wrong, and Judge Travia --

THE COURT: The only way he has been prejudiced, as I understand it, is because of age. But apart from that, he has not lost any witnesses, unfortunately.

MS. SELTZER: Well, it was my feeling, from reading the Government's brief or memorandum, that they seem to think this prejudice is not very substantial. I forget Mr. Schall's words -- "speculative and entirely premature" -- and things like that.

THE COURT: No. I think he has lost an absolute right because he has lost the right which enforced by the Court of Appeals, and I expect by the Supreme Court, to consider the Youth Act, wherever it may be considered, and he has lost that.

MS. SETLZER: I did not cite it in my brief, but in June of 1974 the Supreme Court decided a case, Dorszynski versus the United States --

THE COURT: Who?

MS. SELZTER: Dorszynski, last June, 41 Lawyers Ed. 2d., 49 Supreme Court. I don't have the entire citation. All I have is the advance sheets on it, but it was June 26, 1974 that it was decided, and that was a case where they said that a Judge had to make a determination.

THE COURT: Well, that's clear. He has that right to have that judgment made, and now it is forever swept away, and you say that if he had a couple of bank robberies in his kick, then Mr. Schall's argument would be, or have more weight, but, you say, he is a first offender, or, the first time he has ever been caught, anyway.

MS. SELTZER: And who, in my experience in this Court, would most probably have been sentenced under the Youth Correction Act.

It is not a spurious argument, your Honor.

He will go through life with a criminal record, and that's a serious matter.

THE COURT: I thought you had some arrangement under which it would be a misdemeanor.

MS. SELTZER: It's still a criminal record. He has not been offered a plea to a petty offense, and, legally, if he ever has to apply for a job, and he is

asked is he has ever been convicted of a crime, he must reply, "Yes."

THE COURT: Don't you think that's all you have, really, under the Sixth Amendment?

MS. SELTZER: I'm not arguing that he had to be held up for ridicule in the community, or that he suffered embarrassment or humiliation.

The are other forms of prejudice that have been argued which may or may not apply.

Mr. Schall made the argument that he interpreted Barker v. Wingo as saying that the prejudice had to relate to the defense that the defendant is going to interpose, and since Mr. Roberts was not going to interpose a defense, because he was going to plead, the whole issue would be moot.

I think if one reads the Barker case and Moore v. Arizona, I think it becomes clear that the prejudice indicated by the Supreme Court relates not only to interposing a defense at trial.

I think this prejudice is extremely great, extremely harmful to Mr. Roberts.

THE COURT: Doesn't that, though, come back to haunt you a little bit? Because if it was so important, why didn't he ask for the case to be transferred to another Judge or something, because that could be one of

those situations whereby, whether he could cop a plea or not, everything pointed in the direction of making sure that he didn't go over age.

Maybe I am unduly sensitized to that, because I can remember one case in which Mr. Edward Kelly moved heaven and earth to get some fellow in here from Chicago before he turned twenty-six, and get him into court, and either get him tried, or get him to plead, and he did plead.

MS. SELTZER: The question you are raising, your Honor, is what is the defense counsel's responsibility toward --

THE COURT: To defend his client without transgressing the rules of ethics.

MS. SELTZER: But in terms of promoting the prosecution of the case -- especially here, where the defendant was told that he would not have a misdemeanor plea until the other case was disposed of, so that even if counsel came in, we would not have been able to get a misdemeanor plea, because the Smith case had not been disposed of.

But as I understand it, there is a lot of dicta in the Barker case, also, that discusses the demand waiver theory, and the responsibility of a defendant to promote the prosecution of the case.

It seems to me, if one reads Barker, it is not the responsibility of the defendant, but rather the prosecution, and merely that he does not ask that a case be put on the calendar --

THE COURT: Well, Barker doesn't quite say that. Judge Weinfeld said --

MS. SELTZER: Your Honor, if I could quote from Barker. I have the Lawyers' Edition here. This is paragraphs 19 to 21. I'm not sure where it would appear in the United States Reports or Supreme Court Reporter.

"The nature of the speedy trial right does not make it impossible to pinpoint a precise time in the process when the right must be asserted, or waived, but that fact is not argument from placing the burden of placing the right solely on the defendant. A defendant has no duty to bring himself to trial. The State has that duty, as well as assuring the trial is consistent with due process. We reject, therefore, the rule that a defendant who fails to demand a speedy trial, forever waives his right."

The point is, that the first time this case is ever put on the calendar, that is, when we appeared before you, the right to a speedy trial was brought up.

It was not brought up three days before trial, or on appeal, or some time after the trial.

I think you will recall that it was raised at that time, and the fact that I didn't come in during that year -- Is it my responsibility to come in during that year?

THE COURT: What do you say, Mr. Schall?

MR. SCHALL: Your Honor, I would begin by quoting from Barker v. Wingo.

The Supreme Court stated:

"We emphasize that failure to assert the right" to a speedy trial, "will make it difficult for a defendant to prove that he was denied a speedy trial."

I inserted "to a speedy trial" after the word "right."

We start from the premise, your Honor, that the Court looks very skeptically upon a situation where a defendant has not asserted his right, and I think that is relevant in this situation.

In October of 1973, going back to that period of time, Assistant United States Attorney Moore met with and told Mr. Roberts that he could have a disposition to a disdemeanor plea after the Smith cases were completed, and I have since talked to Mr. Moore, and he has confirmed to me that at that time Mr. Roberts said, "Fine. I accept. I will cooperate."

At that time, the deal was clear, the understand-

ing was reached, the cards were on the table.

Mr. Roberts was told, "You can have your plea after the Smith case. You will cooperate." He said, "Fine. I'll cooperate."

He never voiced any objection. He never said, "Well, I've got this problem. I'm going to be twenty-six. I'll miss out on my possibility of Youth Correction Act treatment." Not a word was said.

Time passed. The Government has made an arrangement with him. We had made a deal, an understanding had been reached. He never said a word by way of complaint. He understood the terms.

The case went on, time passed, and nothing was mentioned. Neither Mr. Roberts nor his counsel ever once came to the office of the United States Attorney and said, "Look. We have this problem. I know we have the agreement to cooperate, but yet our client is going to be twenty-six. Can we work out something? Can something be done?"

Not a word is said until the case is called in your Court on the 13th of November, and I think that in this case, because of the fact that an agreement had been entered into -- and the terms were agreed upon between the Government and Mr. Roberts -- I think that the failure to make any assertion or to assert any right

is particularly devastating to the defendant in this case, more so than if a defendant were waiting for trial.

Terms were reached. He never complained. Time passed. Not a word was said.

Secondly -- and I would emphasize -- It is true that the Courts do say that the impairment of the defense is not the only prejudice which a defendant can suffer, but again, here, the point is, I think, that is the most fundamental right, and with regard to prejudice, it can be remembered that the option here was one of going to trial, presumably, or a disposition, and he chose the disposition, and although it is his right, nevertheless, the end benefit which he might have gained, namely Youth Correction Act treatment, while he had the right to be considered for it, the definite end benefit is speculative in nature, and finally, I think we come down to the point of the cause for the delay, and I think clearly, that while there are cases which I have indicated in our memorandum which place more of a burden on the Government, there is the consideration of Court congestion.

The Barker Court, and I think the Second Circuit -- has characterized this as a situation where it is neutral, or not to be weighted so heavily against the Government, and I think it is particularly important here, where we

have an agreement. He is told, "After the Smith cases."

There were not any qualifications put on it. He never came in and said, "Well, I've got my Youth Correction Act treatment to think of." This was never raised. The agreement was reached, and the Government stands ready to fulfill its part of the agreement.

In fact, I have discussed the matter with Ms. Seltzer, and the desire of Mr. Roberts to cooperate with the Government has been confirmed to the Government by him, and I think that it is just a situation of, quite frankly -- and I don't say anyone acted improperly -- but I think it is a situation, quite frankly, where a defendant is seeking to take advantage of a situation, and trying to get out of an obligation.

THE COURT: No. I don't see how counsel can forego a possible right --

MR. SCHALL: Oh, no. I am not saying that, your Honor.

I am saying that in the circumstances of this case, I think that because of the fact of what happened on the 15th, and the agreement with the Government, I think the failure to waive takes on a particular importance here, and that he is virtually precluded because of that.

I mean, never once did we hear anything --

THE COURT: As I understand it, the arrangement -- or is there an agreement that the arrangement was that he would plead to a misdemeanor?

MR. SCHALL: That is correct.

THE COURT: You see, so, in a way, he had already crossed the bridge of whether or not he would want Youth treatment.

But of course, the risk on Youth Treatment is that you might not get 5010(a). You might get 5010(b), which might not be so good.

MS. SELTZER: You mean, that he could be incarcerated up to six years or four years. But, then, there is a Constitutional argument as to that.

If a defendant pleading to a misdemeanor is sentenced for a period up to four years --

THE COURT: No, no. I say, if he pleads to a misdemeanor, I am not sure he could be sentenced under 5010 --

MS. SELTZER: Well, it is my experience -- and I have had many, many defendants who have pled to misdemeanors, mostly before the Magistrate --

THE COURT: And got 5010(a)?

MS. SELTZER: Yes. In the Magistrate's Court, it happens all the time.

THE COURT: 5010(a)?

MS. SELTZER: I think it is -- Well, most of them are put on probation. Is that 5010(a), or -- I have never had the experience where a defendant was incarcerated up to four or six years when pleading to a misdemeanor. I think there would be a Constitutional argument against that.

THE COURT: I suspect that, but that wouldn't come up until there was a probation violation.

MS. SELTZER: If the defendant was sentenced to the care and custody of the Youth Correction Department, or whatever they refer to it as, for a period of up to four years after he pled to a misdemeanor, there would be a question as to whether that was legal, because if sentenced as an adult, he could only be sentenced to a period of up to one year.

I have never been in a situation like that yet, but that is not, at this point, the situation here.

THE COURT: Well, your point really, I think, is that he was here immediately damaged.

MS. SELTZER: I believe so.

MR. SCHALL: The only think I would say in rejoinder to Ms. Seltzer is that the Courts have stated that he doesn't have to "bang on the doors," but there is a different situation here.

Here, there had been an agreement of cooperation.

The understanding was reached. He was told specifically when he could have the disposition, and when he could plead, and all that was specifically spelled out at the opening.

MS. SELTZER: It is my feeling that when a case is called in this District in October, and an arrangement made for a plea, and a man is going to reach his twenty-sixth birthday the following May, I do not think that it is not a fair assumption on his part -- especially when the Judge makes no comment that a delay is expected -- that it is not to be his expectation that the case will be prosecuted with diligence, and the period between October and May is a fairly long period of time.

THE COURT: Can he just lie on the grass there?

MS. SELTZER: I think that he can, and I would cite Barker, where I think Barker says that you cannot infer a waiver of a right such as this merely by an agreement such as that which he made with the Government, and agreement to cooperate, that is not a waiver of his fundamental right to a speedy trial, and it would have to be a much more specific waiver than that.

THE COURT: Well, maybe so, maybe so.

Let me reserve decision on it, if you will.

MS. SELTZER: Your Honor, I don't know if this

is exactly the right things to hand up to a Judge, but I have Xeroxed certain parts of the opinion which I have underlined.

THE COURT: I have it, and it was mentioned in the brief.

MS. SELTZER: Slightly.

Your Honor, a trial date has been set for February 3rd. Would it be possible to put the trial off, merely because --

THE COURT: I am more interested in the Smith's at this moment. I didn't know we had them, and, where are they? What is going to happen to the Smith's? We have no trial date, no nothing.

MR. SCHALL: I have been in contact with your office, your chambers, through Miss Hyman, on this, and as I indicated, presently our office is discussing with them a disposition in terms of taking care of both their postal and FHA exposure at once, and the discussions are continuing with them, and I have emphasized that in view of the fact that this motion has been made on behalf of Mr. Roberts, that the offer remains of the disposition in his case, and it can now be conceded at this time. It doesn't have to wait the completion of that other matter.

In other words, we are saying, if he is so inclined,

he can have the disposition now, rather than waiting until that has been taken care of.

THE COURT: Well, let me decide this motion first.

MS. SELTZER: Your Honor, the case was originally set down for February 3rd. Can we take it off the calendar for February 3rd? I won't be here on February 3rd.

THE COURT: You will be on vacation?

MS. SELTZER: Yes, and I wouldn't want to leave this to someone in my office.

THE COURT: Perhaps you will win the motion.

MS. SELTZER: I think it will be decided before February 3rd.

THE COURT: Probably by 11:00 o'clock on Monday.

MR. SCHALL: Can we contact you?

THE COURT: No. We will contact you.

MR. SCHALL: I see. Thank you.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA, : 73 CR 884

-against- :

TOMMY ROBERTS, : MEMORANDUM and ORDER

Defendant. :

- - - - - - - - - - - - - - - - - - - -X

Appearances:

MARION SELTZER, Esq., (Federal Defender Services Unit) for defendant

ALVIN A. SCHALL, Esq., (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Government

DOOLING, D. J.

Defendant was arrested on May 25, 1973, on a charge that on May 2, 1973, he had in his possession twenty checks that he knew were stolen and which had been contained in letters stolen from the mail (18 U.S.C. § 1708). He was indicted on October 2, 1973, on ten counts. All ten checks listed in the indictment were City welfare checks dated May 1, 1973. At the same time Alonzo and Henry Smith were also indicted on somewhat related offenses (73 CR 882, 883). All three cases were, under the random assignment system, assigned to Judge Travia.

Defendant was arraigned before Judge Travia on October 15, 1973. He was late for Court, and, by way of explaining that his tardiness was not recalcitrance, his counsel explained (Tr. 3, ll. 11-12).

> "He is due here. I understood there would be a disposition."

Just then defendant did appear, waived reading of the indictment, pleaded not guilty, was continued on the $5,000 unsecured personal appearance bond he had given before Magistrate Catoggio, and was given twenty days to make motions, although no motion time had been requested. On October 23, 1973, about five months after the arrest, the Government served and filed a Notice of Readiness for Trial "as soon as the case can be reached by the Court, subject to receiving three days' advance notice of the actual date for trial." No motions or other applications of any kind were thereafter made by either party.

The parties are agreed that in fact a misdemeanor disposition had been agreed upon, and that it was not to take place until after the cases against the Smiths were tried or otherwise disposed of. Disposition of the Smith cases, however, was complicated by the existence of a

possibility that one or both defendants might be indicted in unrelated FHA matters; the Smiths were, and are, unwilling to dispose of their pending cases unless the FHA matters have also been put behind them. Their cases remain indisposed of, but they are still under active negotiations looking toward disposition without trial. However, the United States Attorney is now prepared to make the agreed disposition of defendant's individual case without waiting until the Smith cases are tried or otherwise disposed of. The Assistant United States Attorney now in charge of the cases is the third Assistant to whom they have been assigned; those earlier assigned have left the United States Attorney's office.

Judge Travia was engrossed from October, 1973 until July 5, 1974, in the trial of United States v. Bernstein, et al., 72 CR 587. He was unable to conduct other trials, but he did give attention to the other cases assigned to him on regularly scheduled motion and plea days, and exigent cases were transferred to other judges for trial where possible. After the verdict in the Bernstein case, Judge Travia was on extended vacation, and, upon his return,

announced his intention of resigning. Meanwhile no action had been taken in the present case, or in either Smith case by any party or by the Court. And, meanwhile, defendant, a first offender born on May 21, 1948, had "attained his twenty-sixth birthday," and so lost irretrievably his right to be considered for probation under the Youth Corrections Act, 18 U.S.C. §§ 4209, 5010(a) and his chance of having the conviction expunged upon early discharge from probationary supervision pursuant to Section 5021. Cf. Dorszyuski v. United States, 1974, 417 U.S.

Because of Judge Travia's resignation, the case was reassigned, and, at an initial pre-trial conference called at the instance of the Court for November 13, 1974, defendant raised for the first time the alleged denial of this Sixth Amendment right to a speedy trial. A trial date was set (February 3, 1975) subject to defendant's formalization of the Sixth Amendment motion. The present motion followed.

Defendant explicitly disclaims reliance on the prompt disposition plan of the district. Defendant's reliance is on so much of the Sixth Amendment as engages that the

"accused shall enjoy the right to a speedy and public trial, by an impartial jury." Here, no "trial" was in fact in prospect. It may be doubted that impropriety attended the Government's now abandoned decision to delay the disposition of defendant's case by plea until the Smith cases had been disposed of, but plainly that delay element was of the Government's procurement, and was in its interest. Defendant's acquiescence in the delay can not in reason be interpreted as a waiver of his constitutional right (cf. United States v. Hanna, D.Del. 1972, 347 F.Supp. 1010), and the early agreement on the disposition by plea can not be considered a factor inhibiting any request on the defendant's part for an early "trial" of his indictment. The terms of disposition, once articulated, gave both parties an interest in awaiting the moment when the Smith cases could be terminated. It was, however, as between the Government and the defendant, the Government's responsibility to effect a speedy disposition of the Smith cases.

No claim is made that the defendant's ability to defend has been impaired by the delay, and, indeed, in the frame of reference in which the case exists, trial and

defense are not genuinely involved. Emphatically, however, "prejudice to his defense"/is not in the strict and narrow sense the only ground on which a defendant can complain against delay. Moore v. Arizona, 1973, 414 U.S. 25, 26-27. And Government counsel are very fair in noting that recent cases suggest that institutional failures caused by inadequate staffing of the courts and the prosecutors' offices can explain but cannot excuse the failure to accord defendants speedy trials. E.g., United States v. West, D.C.Cir. 1974, 504 F.2d 253, 256; United States v. Fay, 1st Cir. Nov. 11, 1974, _____ F.2d _____. Strunk v. United States, 1973, 412 U.S. 434, 436, reiterated that concept as expressed in Barker v. Wingo, 1972, 407 U.S. 514, 531, 538.

The precise tests of Barker v. Wingo are ill-suited to the determination of the present case because the context of application is so different. However, magnitude of delay is not here significant in the usual way. Any delay of conviction beyond May 21, 1974, a year after the arrest, seven months after indictment, had the specifically and irremediably damaging effect of denying the defendant

the right to have the sentencing court consider granting the defendant first offender probation under Section 5010(a). The reason for the delay was the Government's insistence that disposition be deferred until after the Smith cases were concluded, combined with the more general governmental failure to provide a tribunal to the parties. The terms of the disposition plan make it difficult if not impossible to tax the defendant with responsibility for failing to demand an earlier disposition. In principle he could have pressed for a disposition on the very ground now assigned as a reason for dismissal - that he could hope for Youth Corrections Act treatment only if sentenced before his twenty-sixth birthday. But practically, such an approach would not be easy, and might have invited the risk that the Government would insist on a felony plea or a transfer of the case to another judge for speedy trial on the ten felony charges. The prejudice to the defendant is the loss of a valuable right; it cannot be considered loss of a merely speculative right. Uncertain as the canons of sentencing are, it can certainly be said that a youthful first offender's chances of Section 5010(a)

probation, where there is a background of willingness to "cooperate" with the Government, are real and substantial.

It is concluded that the defendant's motion must be granted on the constitutional ground. It is

ORDERED that the indictment is dismissed.

Brooklyn, New York

January 20, 1975.

U. S. D. J.

Form No. 100

MINAL DOCKET

75CR115 TRAVIA, J.

73 CR 882

DOOLING, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
ALONZO SMITH	
	For Defendant:
	Barry Krinsky
	66 Court St.
	Brooklyn, NY.
	643-1878
eft of mail	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
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k,							
rshal,							
orney,							
mmissioner's Court,							
tnesses,							

DATE	PROCEEDINGS
2-73	Before Travia J - Indictment filed.
15-73	Notice of Appearance filed.
5-73	Before Travia J - Case called - Deft & counsel Barry Krinsky present - deft arraigned and enters a plea of not guilty - waives reading of the Indictment - 20 days for motions - bail continued.
25/73	Notice of readiness for trial filed
14-75	Before Dooling J - case called - deft & counsel B.Krinsky present - adjd to sentence date in 75 CR-115.

Form No. 100

MINAL DOCKET

75CR15 75CR882 A 48

73CR 883 ~~TRAVIA, J.~~ DOOLING, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	
HENRY SMITH	
	For Defendant:
	Barry Krinsky
	66 Court St.
	Brooklyn, NY
	643-1878
Theft of mail	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
ne,								
erk,								
arshal,								
ttorney,								
ommissioner's Court,								
Witnesses,								

DATE	PROCEEDINGS
0-2-73	Before Travia J - Indictment filed.
0-15-73	Notice of Appearance filed.
0-15-73	Before TRAVIA J - Case called - deft & counsel Barry Krinsky of Legal Aid present - deft arraigned and enters a plea of not guilty - deft waives reading of the Indictment - 20 days for Motions - bail continued.
0/26/73	Notice of readiness for trial filed
2-14-75	Before DOOLING J - case called - deft & counsel present - adjd to sentence date in 75 CR-115.

Form No. 100

MINAL DOCKET

75 CR 115

73 CR 82
73 CR 86

DOOLING, J.

A 49

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: Woodfield
vs.	
ALONZO SMITH and	
HENRY SMITH	
	For Defendant:

Did conspire to forge documents (obtaining loans insured by FHA)

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED	DISBURSED	
,,							
hal,							
ney,							
missioner's Court,							
esses,							

ATE	PROCEEDINGS
75	Information filed.and Waiver of Indictments filed.
5	Before DOOLING J - case called - defts & counsel Barry Krinsky present - On motion of US defts not objecting Overt Acts 2,3,5,6,7, 8,9,10,11, 12 ,3 and 14 are stricken - defts arraigned and after being advised of their rights by the court waive indictment and each deft enters a plea of guilty as charged - sentences adjd without date- bail continued.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

MICHAEL MULQUEEN being duly sworn,

deposes and says that he is employed in the office of

United States Attorney for

the Eastern District of New York, attorney for the APPELLANT

herein.

That on the 19th day of February 19 75, he did serve a true copy of

the hereto annexed Two Copies of Appellant's Appendix

on the office of William J. Gallagher, Esq., Legal Aid Society

attorney for the APPELLEE herein, located at 509 United States

Courthouse, New York, N.Y. 10007

Borough of Manhattan, City of New York, by leaving a true copy of the same with

the person in charge of said office, there being no one present who was authorized to give an admis-

sion of service.

Michael Mulqueen

Sworn to before me this

19th day of February 19 75

OLGA S. MORGAN
Notary Public, State of New York
No. 24-5019566
Qualified in Kings County
Commission Expires March 30, 19 75

Sir:

You will please take notice that a ..... *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, Brooklyn, New York ..... *19*.....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

.....

Attorney for .....

Sir:

Please take notice that the within ..... *will be presented for settlement and signature to the Honorable* ..... *at the office of the clerk,* .....

.....

Borough of ..... *City of New York, on the* ..... *day of* ....., *19* ....., *at* ..... *o'clock in the* ..... *noon, or as soon thereafter as counsel can be heard.*

Dated, Brooklyn, New York ..... *19*.....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

.....

Attorney for .....

Court Index No.

.....

United States Attorney,

Attorney for .....

Due service of a copy of the within is hereby admitted.

New York, ..., *19* .....

.....

Attorney for .....

To

.....

Attorney for .....

Form No.

FPI—SS—6-21-68—20M—2601